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IN THE

Supreme Court of The United States

October Term, 1960

No. 352

PONCA WHOLESALE MERCANTILE COMPANY,
a corporation,

Appellant,

vs.

ROCKY MOUNTAIN WHOLESALE COMPANY, INC.,
a corporation,

Appellee.

On Appeal from the Supreme Court
of the State of New Mexico

JURISDICTIONAL STATEMENT

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in The

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ROCKY MOUNTAIN WHOLESALE COMPANY, INC.,
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Appellee.

On Appeal from the Supreme Court
of the State of New Mexico

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Supreme Court of the State of New Mexico which affirmed a judgment of the District Court of Bernalillo County, State of New Mexico. All emphasis supplied.

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico is reported in Volume 360 P. 2d 643, (the official state reporter not yet available), a copy of which opinion is annexed hereto as Appendix A.

JURISDICTION

The suit was one instituted by appellee to enjoin the appellant from selling cigarettes at a price below "cost to wholesaler" as defined by the New Mexico Cigarette Fair Trade Practices Act.

The decision of the New Mexico Supreme Court was dated and entered February 8, 1961, and following appellant's Motion For Rehearing, and denial thereof, Mandate and Final Order was filed therein April 12, 1961. Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Supreme Court of the State of New Mexico on June 30, 1961.

The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. Sec. 1257 (2); June 25, 1948, c. 646, 62 Stat. 929.

The jurisdiction of this Court is believed to be sustained by, among others, the cases of:

Charleston Federal Savings & Loan Ass'n, et al. v. Alderson, State Tax Com'r., W. Va. 1945, 65 S. Ct. 624, 627, 324 U.S. 182, 185, 186, 89 L. Ed. 857;

Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134, 34 S. Ct. 874, 877, 58 L. Ed. 1245;

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Home Ins. Co. v. Dick, 281 U.S. 397, 407, 50 S. Ct. 338, 341, 74 L. Ed. 926;

Nickey v. Mississippi, 292 U.S. 393, 394, 54 S. Ct. 743, 78 L. Ed. 1323;

Whitfield v. Ohio, 297 U.S. 431, 435, 436, 56 S. Ct. 532, 533, 80 L. Ed. 778.

STATUTE INVOLVED

The state statute which is invalid as being repugnant to the Constitution of the United States is the New Mexico "Cigarette Fair Trade Practices Act", Laws of 1949, ch. 175, Sections 1 to 13, incl., Sections 49-3-1 to 49-3-13, incl., Article 3, New Mexico Statutes Annotated, 1953 Compilation, the verbatim text of which is set forth as Appendix B.

QUESTIONS PRESENTED

(a) Whether the New Mexico Cigarette Fair Trade Practices Act, Laws of 1949, ch. 175, Sections 1 to 13, incl., (49-3-1 to 49-3-13, N.M.S.A. 1953), which permits a manu-

facturer of cigarettes to sell cigarettes to a "direct buying retailer" at a given price established by the manufacturer and prohibits wholesalers from selling cigarettes to direct buying retailers *at the same price* or any other price below "cost to wholesaler" as defined by said Act is repugnant to and in violation of Section 1, Fourteenth Amendment to the Constitution of the United States.

(b) Whether said New Mexico Cigarette Fair Trade Practices Act when interpreted to prohibit the wholesaler from selling cigarettes to direct buying retailers below "cost to wholesaler" as defined by the Act is a taking of property without due process of law.

STATEMENT OF THE CASE

On, and for many years prior to, November 28, 1958, Ponca Wholesale Mercantile Company, a corporation, appellant herein, was a wholesaler of, among other things, cigarettes, cigars, tobacco, candies, etc., with its principal New Mexico office at Albuquerque, New Mexico, and held a wholesaler's license from the Bureau of Revenue, State of New Mexico.

Rocky Mountain Wholesale Company, Inc., a corporation, appellee herein, was licensed as a wholesaler and dealt in like merchandise, with its principal place of business in Albuquerque, Bernalillo County, New Mexico. November 28, 1958, Rocky Mountain Wholesale Company, Inc. filed in the District Court, Second Judicial District, County of Bernalillo, State of New Mexico, its complaint, seeking an injunction against Ponca Wholesale Mercantile Company for alleged violation of the New Mexico Cigarette Fair Trade Practices Act (49-3-1 to 49-3-13, incl., N.M.S.A. 1953) for selling cigarettes below "cost to wholesaler" as defined by said Act.

The State of New Mexico passed the Cigarette Fair Trade Practices Act, sometimes hereinafter referred to as the "Below Cost Sales Act", with special application only to cigarettes. It has no such act of general application. A sale "below cost to wholesaler" as defined by the Act is computed by adding the basic cost to wholesaler, plus state and federal taxes and licenses, plus a mark up to cover the cost of doing business of 2% of the basic cost in the absence of proof of a lesser cost, plus cartage cost of ¾ of 1% of the basic cost of cigarettes to the wholesaler in the absence of proof of a lesser cost.[1]

Ponca Wholesale Mercantile Company's sales of cigarettes below "cost to wholesaler" as defined by the New Mexico Cigarette Fair Trade Practices Act were made only to firms that were privileged to buy direct from the factory at the same price at which wholesalers, including Ponca Wholesale Mercantile Company and Rocky Mountain Wholesale Company, Inc., could buy. (R. 190, 202).

Appellant, Ponca Wholesale Mercantile Company, filed its motion to dismiss appellee's complaint on the ground that the Cigarette Fair Trade Practices Act was invalid and unconstitutional as being in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America (R. 22).

---

[1] (i) (1) "Cost to wholesaler" shall mean the basic cost of the cigarettes involved to the wholesaler plus the cost of doing business by the wholesaler, and must include, without limitation, labor costs (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising. (2) In the absence of proof of a lesser or higher cost of doing business by the wholesaler making the sale, the cost of doing business by the wholesaler shall be presumed to be two per centum (2%) of the basic cost of the said cigarettes to the wholesaler, plus cartage to the retail outlet, if performed or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser or higher cost, shall be presumed to be three-fourths of one per centum (¾ of 1%) of the basic cost of the said cigarettes to the wholesaler.

The trial court overruled appellant's motion and after trial on the merits entered judgment permanently enjoining appellant from continuing its sales at less than "cost to wholesaler" as defined by said Act (R. 23).

An appeal was perfected to the state Supreme Court from the trial court's judgment (R. 44), and among the points presented for reversal by Point I appellant urged the invalidity of said Act due to its repugnancy to the Constitution of the United States and more particularly Section 1 of the Fourteenth Amendment thereto.

The state Supreme Court ruled that the Act was not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Under the state law, retailers as well as wholesalers may buy cigarettes direct from the factories. The factories may and do sell direct to "direct buying retailers" at the same prices the factories sell to wholesalers. But the wholesaler may not sell to the "direct buying retailer" for less than "cost to wholesaler" as defined by the Act.

In servicing retail stores with cigarettes and candies the wholesaler can profitably sell cigarettes to "direct buying retailers" at a price above factory cost but at less than "cost to wholesaler" as defined by the Act where they also perform the services of affixing state tax stamps to cigarette packages for distribution and sale.[2]

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[2] TABULATION

NET COST IN PURCHASES FROM MAUFACTURER

$10.00	per 1,000 (5 cartons per 1000)
1.00	Less 10% factory allowed discount (10% of $10.00)
9.00	
.18	Less 2% factory allowed discount — cash within 10 days (2% of $9.00)
8.82	Net cost per 1000 or 1.76 2/5 per carton

"Direct buying retailers" will buy from wholesalers *above the factory prices* but below "cost to wholesaler" because of the local warehousing conditions, stamping services, and delivery services received from the wholesaler.

Appellant is prohibited by said Act from competing with factories in sales to "direct buying retailers" by adding to the factory price a charge for the services rendered, by selling below "cost to wholesaler" as defined by the Act. This is discrimination in application of the Act's classification, it deprives the appellant of its property without due process of law, and denies appellant equal protection of the law.

2.50	Plus State Stamp tax (72-14-2 N.M.S.A. 1953) 50 cents per carton
11.32	
.10	Less 4% stamp discount (4% of 2.50) (72-14-5 N.M.S.A. 1953)
11.22	Net cost per 1,000 or
2.24	2/5 net cost per carton

"COST TO WHOLESALER" AS DEFINED BY ACT

$10.00	per 1,000 (5 cartons per 1000)
1.00	Less 10% factory allowed discount (10% of $10.00)
9.00	
2.50	Plus state stamp tax (72-14-2 N.M.S.A. 1953) 50 cents per carton
11.50	
.23	Plus 2% cost doing business (49-3-2 N.M.S.A. 1953)
11.73	
.0879	Plus ¾ of 1% (cartage) — (49-3-2 N.M.S.A. 1953)
11.8179	"Cost to Wholesaler" per 1000, or
2.36 2/5	"Cost to Wholesaler" per carton or $2.37

The difference between "Cost to Wholesaler" at $2.37 per carton and net cost of purchase from factory at 2.24 2/5 is 12 3/5 cents per carton.

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Appellant filed its Motion to Dismiss with the Clerk of the District Court of Bernalillo County, State of New Mexico, on January 9, 1959, on the ground, among others, that (R. 22):

> " * * * the statute of the State of New Mexico referred to in plaintiff's complaint is invalid and unconstitutional for the reason such is in violation of the Fourteenth Amendment of the Constitution of the United States of America."

This motion was renewed at the close of the plaintiff's case (R. 147) and at the close of all evidence (R. 222).

The same general ground was advanced before the New Mexico Supreme Court on appeal as appellant's Point I, and the New Mexico Supreme Court held:

> "Appellant's challenge to the act is that it violates * * * the 14th Amendment to the Constitution of the United States. The first attack is that it is an unreasonable and arbitrary interference with private property rights; that it has no reasonable or substantial relation to the public morals, safety or general welfare; and that it is not within the proper exercise of the police power of the state. We cannot share appellant's view."
>
> * * *
>
> "Our next inquiry is whether the act is arbitrary and discriminatory."
>
> * * *
>
> "We find nothing arbitrary or discriminatory in the legislative act denying a wholesaler the right to sell below cost to a direct buying retailer but permitting such wholesaler the right to sell below cost

to another wholesaler. Whether a wholesaler sells to another wholesaler or to a retailer it is intended that there be but one 'cost to wholesaler' and one 'cost to retailer' in the ultimate price to the consumer."

On motion for rehearing appellant specifically invited the attention of the Supreme Court of the State of New Mexico to the fact the court had failed to fully consider appellant's position that the New Mexico Cigarette Below Cost Act was arbitrary and discriminatory because: (R. 312)

"1. Wholesalers are prevented by the provisions of the act from competing with a manufacturer for the direct buying retailer's business, and

2. Wholesalers cannot sell to the direct buying retailers for the same price as the manufacturer can."

Thus the Supreme Court of the State of New Mexico by its decision and in denying such motion has directly ruled upon the constitutional question presented and its ruling was to the effect that the below cost act of the state was not repugnant to the Constitution of the United States.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States specifically protect the property rights of individuals (including corporations) and guarantees equal protection of the laws. Under these constitutional guarantees it is the right of an owner to establish the price at which its property shall be sold. This right is an attribute of the property itself and is a valuable property right within the protection of said constitutional amendment.[3]

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[3] *Tyson & Brother United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 47 S. Ct. 426, 71 L. Ed. 718; *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522; 43 S. Ct. 630, 67 L. Ed. 1103.

The citizens of the United States have enjoyed no rights more fundamental than the right to equal protection of the law and assurance against deprivation of property without due process of law. Such has a direct relationship to the economic structure of our nation's commercial advances and vast material wealth. The highest courts of many states have disagreed as to the constitutionality of fair trade and below cost acts. To date, this court has not considered any substantially identical questions which are here presented as applied to comparable factual situations.

The general public, state courts, state legislatures, the Congress and federal courts of the United States all need an exposition of constitutional rights as related to commercial transactions under below cost sales acts. This case clearly affords such exposition in the following question:

> May a state, by legislation, classify dealers in cigarettes, to prohibit sales below cost to wholesaler as defined by law?

The New Mexico Cigarette Below Cost Act defines a "wholesaler" as:

> "(d) 'Wholesaler' shall mean and include any person who acquires cigarettes for purposes of sale to retailers or to other persons for purposes of resale." (Laws of 1949, ch. 175, Sec. 2, 49-3-2 N.M.S.A. 1953)

This definition is not broad enough to include manufacturers of cigarettes selling to direct buying retailers, and thus exempts such manufacturer from the provisions of the act.

Then under the New Mexico Cigarette and Tobacco Tax Act, whereby dealers in cigarettes are by the state licensed, it is provided:

> "(i) The term, 'direct buying retailer', shall mean any person, wherever resident or located, who is engaged

in the sale of cigarettes at retail in this state, who enjoys the privilege of purchasing cigarettes directly from the manufacturer thereof." (Laws of 1943, ch. 95, Sec. 1, 72-14-1 N.M.S.A. 1953)

Wholesalers and certain retailers can buy cigarettes direct from the manufacturer. The factories sell cigarettes direct to wholesalers and "direct buying retailers" at the same price — the factory price. Therefore, the wholesaler is placed in competition with the manufacturer in its sales to direct buying retailers. But the wholesaler, through warehousing facilities, stamping services, and retail store delivery services, could still compete with the manufacturer in sales to the direct buying retailer by selling cigarettes under "cost to wholesaler" as defined by the Act, and over the factory cost, were it not prohibited therefrom by the state cigarette below cost law. The factory makes the same sales as the wholesaler to direct buying retailers, but is not subject to said Act.

The act provides an arbitrary wholesaler's resale price above the price which manufacturers may sell to retailers, and thereby will eventually eliminate through this discriminatory legislation all wholesalers, and thus the law deprives appellant of property without due process of law and is arbitrary, unreasonable and discriminatory.

Cigarette below cost laws which prescribe a method of determining minimum sales prices that fail to recognize cost differentials between cash and carry wholesalers and service wholesalers have been held unreasonable and discriminatory.[4]

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[4] *Serrer v. Cigarette Service Co., Serrer v. Price* (Ohio 1946), 74 NE 2d 841, 851; *Serrer v. Cigarette Service Co.*, et al., *Serrer v. Price*, et al., 74 NE 2d 853, 858; *Serrer v. Cigarette Service Co., Serrer v. Price* (Supreme Court of Ohio 1947), 76 NE 2d 91, 93.

Likewise the New Mexico cigarette below cost law which prescribes a method of determining minimum sales prices for service wholesalers but fails to recognize sales by factories or manufacturers who in effect are wholesalers to direct buying retailers in competition with the service wholesalers, is unreasonable and discriminatory.

Without contradiction, appellant sold below cost to wholesaler as defined by the Act to no others than direct buying retailers or those privileged to buy direct from the factories (R. 190, 202). The record further indicated they would buy direct if not sold to by a service wholesaler at a price above factory cost but below cost to wholesaler as defined by the Act.

Sales by service wholesalers which are limited to direct buying retailers to whom factories also sell cigarettes at the same prices at which cigarettes are sold to the wholesaler are not in violation of the announced policy of the legislature in adopting the New Mexico Cigarette Below Cost Act.[5]

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5 PREAMBLE

Chapter 175 of Laws 1949 contained a preamble which read as follows:

"WHEREAS, unfair, dishonest, deceptive, destructive and fraudulent business practices existing in transactions involving the sale of, offer to sell, or inducement to sell, cigarettes in the retail and wholesale trades in the state have been and are demoralizing and disorganizing the said trades; and

"WHEREAS, the advertising, offering for sale or sale of cigarettes below cost in the retail or wholesale trade with the intent of injuring competitors or destroying or substantially lessening competition, is an unfair and deceptive business practice; and

"WHEREAS, such practices adversely affect the collection of taxes from the sale of cigarettes and license fees imposed on distributors, wholesalers, retailers and others engaged in the sale of cigarettes; and

"WHEREAS, it is hereby declared to be the policy of this state to promote the public welfare by prohibiting such sales, and it is the purpose of this act to carry out that policy in the public interest;

"NOW THEREFORE:"

Sales to direct buying retailers below "cost to wholesaler" as defined by the Act, but above factory cost, are "demonstrably irrelevant to the policy the legislature is free to adopt and hence an unwarranted interference with individual liberty." *Nebbia v. New York*, 291 U.S. 502, 539, 78 L. Ed. 940, 958 (1934).

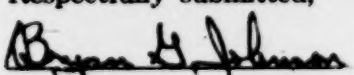
Cases are uniform that price control legislation is unconstitutional if arbitrary or discriminatory. This principle was well illustrated and discussed by the New Jersey court in *Lane Distributors, Inc. v. Tilton, et al.*, 7 N.J. 349, 81 A. 2d 786, 796, (N.J. 1951).

Liberty to enter into normal contracts has been long regarded essential to freedom of trade and commerce as well as beneficial to the general public. *Fairmount Co. v. Minnesota*, 274 U.S. 1, 8, 71 L. Ed. 893, 47 S. Ct. 506.

CONCLUSION

Appellant's appeal here brings before the court substantial federal questions which involve far reaching practical effects on our national economic policy as well as needed judicial decision as a guide in commercial activities by wholesalers generally. The questions here presented are of such a substantial character as to require plenary consideration with briefs on the merits and oral arguments for their resolution.

Respectfully submitted,



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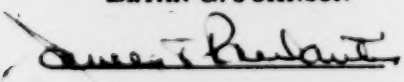
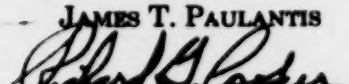


JAMES T. PAULANTIS



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PROOF OF SERVICE

I, JAMES T. PAULANTIS, one of the attorneys for Ponca Wholesale Mercantile Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of August, 1961, I served a copy of the foregoing Jurisdictional Statement on Rocky Mountain Wholesale Company, Inc., a corporation, appellee herein, by delivering the same to Louis Lujan, in person, in his office, 1004 Simms Building, Albuquerque, New Mexico, who is attorney and counsel of record for said Rocky Mountain Wholesale Company, Inc.

James T. Paulantis

APPENDIX A

1. Decision of the Supreme Court of the State of New Mexico.

Rocky Mountain Wholesale Company, Inc., a corporation v. Ponca Wholesale Mercantile Company, a corporation. in the Supreme Court of the State of New Mexico, No. 6781

OPINION

NOBLE, Justice

This appeal results from a judgment permanently enjoining and restraining appellant from selling cigarettes at less than "cost to wholesaler" as defined in § 49-3-2(i) N. M. S. A. 1953 Comp. and from violating the New Mexico Cigarette Fair Trade Act. The case was tried to the court without a jury.

The New Mexico Cigarette Fair Trade Act (§ 49-3-1 to 49-3-13 N.M.S.A. 1953 Comp.) makes it unlawful for any retailer or wholesaler "with intent to injure competitors or to destroy or substantially lessen competition, to advertise, offer for sale, or sell at retail or wholesale, cigarettes at less than cost to such retailer or wholesaler, as the case may be, as defined by this act."

The statute defines "cost to wholesaler" as:

> "(i) (1) 'Cost to wholesaler' shall mean the basic cost of the cigarettes involved to the wholesaler plus the cost of doing business by the wholesaler, and must include, without limitation, labor costs (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising. (2) In the absence of

proof of a lesser or higher cost of doing business by the wholesaler making the sale, the cost of doing business by the wholesaler shall be presumed to be two per centum (2%) of the basic cost of the said cigarettes to the wholesaler, plus cartage to the retail outlet, if performed or paid for by the wholesaler, which cartage cost, in the absence of a proof of a lesser or higher cost, shall be presumed to be three-fourths of one per centum (¾ of 1%) of the basic cost of the said cigarettes to the wholesaler."

It is further provided that any person injured by any violation may maintain an action for injunctive relief.

Appellant's challenge to the act is that it violates Article II, §§ 4 and 18 of the New Mexico Constitution and the 14th Amendment to the Constitution of the United States. The first attack is that it is an unreasonable and arbitrary interference with private property rights; that it has no reasonable or substantial relation to the public morals, safety or general welfare; and that it is not within the proper exercise of the police power of the state. We cannot share appellant's view.

That the New Mexico act has as its purpose the prevention of monopolies and the prohibition of acts which threaten free competition is scarcely open to question. This is not a price fixing act but one which only prohibits the sale of cigarettes at below cost. While the statute sets forth a formula which shall be considered as the cost of doing business in the absence of proof of a greater or less cost to an individual wholesaler or retailer, it, nevertheless makes provisions whereby any wholesaler or retailer by any accepted accounting procedure may establish that his cost of doing business is greater or less than the statutory formula. Certain exceptions to the prohibition against sales below cost are provided, such as the right to sell below cost in good faith to

meet competition and others which need not be discussed here, since no contention is made that any sale complained of comes within any of the specified exceptions.

We think it has been firmly established that a state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation without violation of the due process clause so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940.

> "That the prevention of monopolies and the fostering of free, open and fair competition and the prohibition of unfair trade practices is in the public welfare is obvious, and requires no further citation of authority." *Wholesale Tobacco Dealers Bureau v. Nat'l Candy & Tobacco Co.*, 11 Cal. 2d 634, 82 P. 2d 3 at 10, 118 A.L.R. 486.

We think it would serve no useful purpose to quote at length from the many decided cases sustaining the constitutionality of acts similar to the one under attack here. In *May's Drug Stores v. State Tax Commission*, 242 Iowa 319, 45 N.W. 2d 245 it was said:

> "No one at this date questions the right of the legislature to enact measures, under its police power, that are designed to prohibit acts which threaten free competition."

A great many of the decisions of the Supreme Court of the United States and of the several states sustaining such legislative acts, are collected, quoted from and cited in *Wholesale Tobacco Dealers Bureau v. Nat'l Candy & Tobacco Co.*, supra.

That there is a general feeling that sales below cost substantially lessen free competition is attested by the fact that at least thirty-one states have enacted statutes proscribing sales below cost and that the courts of most such states have agreed that legislation prohibiting below cost sales and having as their purpose the prevention of monopolies and the destruction or substantial lessening of competition are within the police power of the state to promote the general welfare. The following courts, among others, have sustained such legislation against constitutional attack. *May's Drug Stores v. State Tax Commission*, supra; *Wholesale Tobacco Dealers Bureau v. Nat'l Candy & Tobacco Co.*, supra; *State v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P. 2d 650; *Carroll v. Schwartz*, 127 Conn. 126, 14 A. 2d 754; *Kansas v. Consumers Warehouse Market Inc.*, 183 Kan. 502, 329 P. 2d 638; *Moore v. Northern Kentucky Independent Food Dealers*, 286 Ky. 24, 149 S.W. 2d 755; *Fournier v. Troinello*, 332 Mass. 636, 127 N.E. 2d 167; *McElhone v. Geror*, 207 Minn. 580, 292 N.W. 414; *Associated Merchants of Montana v. Ormesher*, 107 Mont. 530, 86 P. 2d 1031; *Hill v. Kusy*, 150 Neb. 653, 35 N.W. 2d 594; *McIntire v. Borofsky*, 95 N.H. 174, 59 A. 2d 471.

The decisions cited by appellant as supporting its position that such acts are not properly within the state's police power are not applicable to the statute now being considered. They are, for the most part, cases dealing with non-signer clauses where the legislatures have prohibited the sale of trade-marked or patented merchandise at below the retail price fixed by the manufacturer. It must be realized that the statute under consideration does not regulate or fix the price of cigarettes, but only prohibits sales below cost with intent to injure competitors or lessen competition. The distinction between the two types of legislation was pointed out in

Wholesale Tobacco Dealers Bureau v. Nat'l Candy & Tobacco Co., supra, where it was said:

> "We believe that these cases clearly establish the constitutionality of the statute here under attack.
>
> The statute must be held to be a reasonable attempt upon the part of the state to accomplish a valid object. It must be borne in mind that this statute does not regulate the selling of commodities — it is the predatory trade practice of selling below cost with intent to injure competitors which the legislature on reasonable grounds has determined is vicious and unfair, that is prohibited. Such determination is clearly within the legislative power."

Likewise our decision in *Skaggs Drug Center v. General Electric Co.*, 63 N.M. 215, 315 P. 2d 967, is neither in point nor controlling on the issues here since it was restricted to a non-signer clause in our Fair Trade Act.

We conclude that the statute under attack must be held to be a reasonable attempt by the state, in the interest of the general welfare to protect free competition and bears a reasonable relation to the legislative purpose. As was said in *May's Drug Stores v. State Tax Commission*, supra:

> "In concluding that the legislature has the power to act on the subject matter of sales below cost and their impact on free competition we of course make no determination as to the wisdom of such laws. That is an economic question which this court is not free to decide."

Our next inquiry is whether the act is arbitrary and discriminatory.

The trial court found that both appellant and appellee are distributors or wholesalers of cigarettes and other mer-

chandise and that appellant has been selling to Furr's Supermarkets, Safeway Stores Inc., Food Mart and Tootie's Cashway Supermarkets cigarettes at six cents per carton below "cost to wholesaler" as defined by the statute. No evidence was offered that appellant's "cost to wholesaler" is less than the statutory formula. The trial court also found that appellee has lost customers, profits and sales by reason of appellant's conduct and that in making such sales appellant has violated the New Mexico Cigarette Fair Trade Act. The court found that each of these stores are retailers, and it is conceded that each of them have the privilege of buying direct from the manufacturer.

But we are told that because the act permits one wholesaler to sell to another wholesaler below cost but denies such wholesaler the right to sell below cost to a retailer privileged to buy direct from the manufacturer, the act is arbitrary and discriminatory. The effect, appellant contends, is to prevent sales by wholesalers to direct buying retailers unless such sales can be made below cost to the wholesaler.

The statute, however, specifically provides that a direct buying retailer must include in his retail price, the basic cost of the cigarettes and both "cost to wholesaler" and "cost to retailer". It is conceded that a direct buying retailer would pay to the manufacturer the same basic price for the cigarettes that the wholesaler must pay. Therefore, unless the direct buying retailer can prove, by an acceptable accounting method, that his cost of doing business is less than the percentages fixed by statute for "cost to wholesaler" and "cost to retailer", both statutory percentages must be included in the retail price.

We find nothing arbitrary or discriminatory in the legislative act denying a wholesaler the right to sell below cost to a direct buying retailer but permitting such wholesaler the

right to sell below cost to another wholesaler. Whether a wholesaler sells to another wholesaler or to a retailer it is intended that there be but one "cost to wholesaler" and one "cost to retailer" in the ultimate price to the consumer. As we have seen, the direct buying retailer is required to include in his retail price both the "cost to wholesaler", the cost of delivery and the "cost to retailer."

We recognize that laws which prohibit sales of merchandise below cost cannot be sustained if the only purpose is to make such sales illegal. *Wiley v. Sampson-Ripley Co.*, 151 Me. 400, 120 A. 2d 289. However, we find no merit to appellant's contention since the New Mexico act makes such sales below cost illegal only when the sale is "with intent to injure competitors or substantially lessen competition * * * ."

In this connection appellant asserts there is no substantial evidence that it made any sales below cost with intent to injure competitors or to substantially lessen competition. It is said that since its only below cost sales were to retailers privileged to buy direct from the manufacturer that these retailers would have resorted to direct buying unless they were sold at below cost; that this would result in the elimination of all sales by wholesalers to such direct buying retailers, and negatives any intent to injure competitors or lessen competition.

Prima facie evidence of intent to injure competitors or to destroy or substantially lessen competition is made by a showing of sales below cost. § 49-3-3(b) N.M.S.A. 1953 Comp., reads:

> "Evidence of advertisement, offering to sell or sale, of cigarettes by any retailer or wholesaler at less than cost to him as defined by this act shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition."

Sales at less than cost are permitted under certain exceptions or conditions enumerated in the act. However, appellant does not rely on any of the specified exceptions but only upon the assertion that the retailers to whom it sold below cost were privileged to buy direct from the manufacturer and the belief of appellant that such retailers would have exercised their direct buying privilege unless appellant sold cigarettes to them below cost.

Appellant argues that § 49-3-3(b) N.M.S.A. 1953 Comp., quoted above, in providing that proof of the facts specified therein "shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition" is invalid and unconstitutional because there is no rational connection between the facts declared to constitute prima facie proof and the facts inferred therefrom, or "presumed" as stated by appellant. We are satisfied that there is a rational and reasonable relationship between the facts required to be proved and the conclusion based thereon by direction of the statute, and the statutory provision is constitutional and valid. Similar statutes have been upheld in *Rust v. Griggs*, 172 Tenn. 565, 113 S.W. 2d 733; *Mering v. Yolo Grocery & Meat Market*, (Cal. App. 1942), 127 P. 2d 985; *People v. Gordon*, 105 Cal. App. 2d 711, 234 P. 2d 287; *State v. Wilkerson*, 164 N.C. 436, 79 S.E. 888; *State v. Hammond*, 188 N.C. 602, 125 S.E. 402. See note in 162 A.L.R. 494,532.

It is next urged that without the prima facie effect accorded the evidence by the statute there is no substantial evidence of intent to injure competitors or to destroy or substantially lessen competition. Appellant asserts that "prima facie" and "presumption" are synonymous and that our decisions in *Morris v. Cartwright*, 57 N.M. 328, 258 P. 2d 719 and *Hartford Fire Ins. Co. v. Horne*, 65 N.M. 440, 338 P. 2d 1067, hold that when any other credible and substantial evi-

dence has been introduced which will support a finding to the contrary the presumption disappears as though it had never existed and the burden is then upon the plaintiff to establish such intent by a preponderance of other evidence. Accordingly it is argued, that appellant, having denied such intent, and having given reasons for its conduct from which the court could have found a lack of such intent, there remained nothing upon which the court could base its finding and conclusion that appellant intended to injure competitors or destroy or substantially lessen competition.

Although it is true that courts have ofttimes used "presumption" and "prima facie" interchangeably and as if they were synonymous, the fact remains that this practice has long been criticized. Also, it is clear that courts have been prone to apply rules and create distinctions where actually no differences existed.

The statute here is one declaring that proof of certain facts shall constitute prima facie evidence of another controlling fact. It is not a presumption of law, nor is it a presumption at all in the true sense, but is a statutory declaration of the probative value and admissibility of certain evidence in relation to the issue of intent. 1 *Jones on Evidence* (5th Ed.) § 12. Thus it prescribes a rule of evidence. *Broderrick v. Rosner*, 294 U.S. 629, 55 S. Ct. 589, 79 L. Ed. 1100.

As used in the statute being considered the "prima facie evidence" does not disappear upon the production of proof to the contrary, but remains as evidence to be considered by the trier of the facts along with all other evidence in the case. *Thomes v. Meyer Store Inc.*, 268 Mass. 587, 168 N.E. 178; *Gemma v. Rotondo*, 62 R.I. 293, 5 A. 2d 297; *Hill v. Cabral*, 62 R.I. 11, 2 A. 2d 482. See also 1 *Jones on Evidence* (5th Ed.) Chapter II.

In addition it seems clear to us that the intent to injure

competitors or substantially lessen competition was amply established by the evidence aside from the prima facie effect given by the statute.

There is testimony that appellee sold cigarettes to one of the Furr retail stores in Albuquerque at prices within the provisions of the Cigarette Fair Trade Act and that appellant during the same period sold to two other Furr retail stores, allowing them a rebate of six cents per carton on cigarettes; that the Furr retail store ceased buying from appellee and has since bought from appellant with a rebate of six cents per carton on cigarettes.

There is also testimony that appellant's policy of selling cigarettes at below "cost to wholesaler" has resulted in some retailers discontinuing buying from appellee and giving their business to appellant. On the other hand, there is testimony by officers of appellant that such sales below "cost to wholesaler" were not made with intent to injure competitors but merely to prevent such retailers from buying direct from the manufacturer. The evidence is conflicting on the material issue of the intention with which the cigarettes were sold below cost. A review of the evidence in this case convinces us that the findings made by the trial court are supported by substantial evidence. A sound discretion rested in the trial court to grant or deny the injunction and we find nothing to compel us to the view that the court abused this discretion. *People v. Black's Food Store*, 16 Cal. 2d 59, 105 P. 2d 361.

Whether we would have reached a different conclusion is not the point. If there is substantial evidence to support the trial court's action in granting or denying injunctive relief the trial court's exercise of its discretion will not be disturbed. As was said in *State v. Wolkoff*, 250 Minn. 504, 85 N.W. 2d 401 at 411, regarding the purpose or intent to injure a competitor by sales below cost:

"Whether the actions of the defendants were with the requisite dual purpose or had such effect was a question of fact to be resolved by the trier of fact. We emphasize what we have repeatedly said, that we may only interfere with the findings of the lower court where the evidence taken as a whole furnishes no substantial support for such findings. If the evidence fairly tends to support the findings — if reasonable persons might draw different conclusions from the evidence — then the findings should not be disturbed."

See *Brown v. Cobb*, 53 N.M. 169, 204 P. 2d 264; *Marchbanks v. McCullough*, 47 N.M. 13, 132 P. 2d 426.

The trial court found that appellant sold cigarettes to Safeway, Food Mart and Tootie's Cashway at below cost. Appellant complains that there is no substantial evidence that it sold to Tootie's Cashway at below cost. The testimony of Mr. Schnaubert, owner of Tootie's Cashway Supermarket, was that Mr. Wooten of Wooten Grocery Company, a wholesaler in Amarillo, Texas, and Mr. Busby of appellant company came to him with a proposition regarding the sale to his store of cigaretves:

"Q. What was the proposition — explain it?

"A. We were to buy our tobaccos from Ponca Wholesale, to be billed, however, to Wooten Grocery Company, and we would pay Wooten Grocery Company.

"Q. Now what was the purpose of that."

• • •

"A. I presume to get around the state law — no rebates on cigarettes.

"Q. Was that talked about at that time?

"A. Yes.

"Q. Was that the real purpose?

"A. Yes sir."

Through the arrangement between appellant and Wooten Grocery Company, Tootie's Cashway Supermarkets received a rebate of three cents per carton on cigarettes and the retailer ceased buying from appellee and commenced buying its cigarettes from appellant. Sales made in this manner are nevertheless sales by appellant. We are not impressed by the contention. The evidence supporting the trial court's finding is substantial. We conclude from a review of the evidence that there is substantial evidence to support the trial court's finding of loss and injury to appellee by reason of the sales made by appellant below cost.

We find substantial evidence in the record to support findings No. 12 and 13 by the trial court.

Finally appellant assigns as error the refusal of the trial court to give appellant's requested findings of facts numbered 10, 11 and 12.

Appellant, in substance, requested the trial court to find that Furrs and Safeway are privileged to buy cigarettes direct from the manufacturer and threatened to do so unless permitted to buy at less than cost to wholesaler; that appellant has sold at below cost only to retailers who can buy direct from the manufacturer; and that in making sales at less than cost to wholesaler appellant did not intend to injure competitors or to destroy or substantially lessen competition.

Under the view we have expressed it was not necessary for the trial court to find whether the retailers to whom appellant sold at below cost did or did not have direct buying privileges or whether they threatened to exercise such direct buying privilege unless they could buy below cost to wholesaler as defined by the statute, nor whether appellant sold to any retailer except those so privileged. We have held there is substantial evidence to support a finding that such sales below cost by appellant did injure appellee. As we con-

strue *Merrick v. Deering*, 30 N.M. 431, 236 P. 735, relied upon by appellant, only the ultimate facts, and not the evidentiary facts, are required to be found by the court. The trial court found:

> "11. That Plaintiff has lost customers, profits and sales because of Defendant's acts and conduct."

We find no merit to appellant's contention.

§ 49-3-11 N.M.S.A. 1953 Comp., provides that if the court shall enjoin or restrain a violation of the act the court shall assess in favor of plaintiff and against the defendant, the cost of the suit, including reasonable attorney fees. Appellee is awarded the sum of $2,500 as attorney's fee in the Supreme Court.

Finding no error the judgment is affirmed and IT IS SO ORDERED.

WE CONCUR:
S/ J. C. Compton, C.J.
S/ David W. Carmody, J.
S/ David Chavez, Jr. J.
S/ Irwin S. Moise, J.

S/ M. E. Noble

Justice

2. ORDER DENYING MOTION FOR REHEARING

This cause coming on before the Court on motion of Appellant for rehearing, and the Court having considered said motion and briefs of counsel and being sufficiently advised in the premises,

IT IS ORDERED that the motion for rehearing be and the same is hereby denied, and the Clerk is directed to issue Mandate forthwith.

3. FINAL JUDGMENT OF THE DISTRICT COURT OF BERNALILLO COUNTY, STATE OF NEW MEXICO

JUDGMENT

This matter coming on regularly for hearing;
Plaintiff appearing with its attorney of record, Louis C. Lujan, and Defendant appearing with its attorneys of record, Iden and Johnson, and this Court having considered the testimony of the parties and the documentary evidence adduced, and being fully advised in the premises, this Court heretofore made its Findings of Fact and Conclusions of Law which are of record in this cause and which are made a part of this Judgment as though fully set out herein, the Court is of the opinion that the Defendant, Ponca Wholesale Mercantile Company should be enjoined and restrained from selling cigarettes at wholesale in the State of New Mexico, at less than "cost to wholesaler" as defined in Section 49-3-2 (i), New Mexico Statutes 1953, Annotated, and should be enjoined and restrained from the further violation of the New Mexico Cigarettes Fair Trades Practices Act (49-3-1 through 49-3-13, New Mexico Statutes 1953, Annotated); and Defendant having heretofore entered its stipulation with reference to selling cigarettes at a price below "cost to wholesaler" as defined in Section 49-3-2 (i), New Mexico Statutes 1953,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Defendant, Ponca Wholesale Mercantile Company, be and it hereby is permanently enjoined and restrained from selling cigarettes at wholesale in the State of New Mexico, at less than "cost to wholesaler" as defined in Section 49-3-2 (i), New Mexico Statutes 1953, Annotated, and is permanently enjoined and restrained from the further violation of the New Mexico Cigarette Fair Trade Practices Act (Sections 49-3-1 through 49-3-13, New Mexico Statutes 1953, Annotated).

IT IS FURTHER ORDERED that, in view of the stipulation heretofore entered herein by the Defendant, Ponca Wholesale Mercantile Company, referred above and provided that Defendant at all times during the pendancy of this cause complies with said stipulation, the effect of the Injunction hereby given is suspended until the final adjudication of this cause in the New Mexico Supreme Court; provided that if the Defendant does not appeal this Judgment, the permanent Injunction herein given shall remain in full force and effect; to all of which Defendant excepts.

S/ JOHN B. MCMANUS, JR.
District Judge

S /ok RGC
Submitted
S/ LOUIS LUJAN
Endorsed
Filed In My Office
Dec. 1, 1959
Salomon Vallejos
Clerk, District Court

4. ORDER DENYING MOTION TO DISMISS, DISTRICT COURT, BERNALILLO COUNTY, NEW MEXICO

This matter coming on regularly for hearing upon the Motion to Dismiss filed herein by defendant, and this Court having heard the arguments of counsel and having considered the briefs submitted, finds:

That the New Mexico Fair Trade Practices Act, being Chapter 175, New Mexico Session Laws 1949, Sections 49-3-1 to 49-3-13 Inc., New Mexico Statutes 1953, Annotated, is a valid and constitutional law in that:

1. It does not violate Article II, Sections 4 and 18 of the Constitution of the State of New Mexico, and

2. It does not violate the 14th Amendment of the Constitution of the United States of America.

IT IS THEREFORE ORDERED that the Motion to Dismiss filed herein by defendant, be, and it hereby is denied.

S/ JOHN B. MCMANUS, JR.
District Judge

Submitted
B. G. JOHNSON
Atty. for Defendant
Submitted
LOUIS C. LUJAN
Atty. for Plaintiff
Endorsed:
Filed in My Office
May 25, 1959
Salomon Vallejos
Clerk, District Court

APPENDIX B
NEW MEXICO CIGARETTE FAIR TRADE PRACTICES ACT, LAWS OF 1949, CH. 175

49-3-1. SHORT TITLE.—This act (49-3-1 to 49-3-13) shall be known and may be cited as the "Cigarette Fair Trade Practices Act."

49-3-2. DEFINITIONS.—When used in any part of this act (49-3-1 to 49-3-13), the following words, terms and phrases and any variations thereof required by the context, shall have the meaning ascribed to them in this section except where the context clearly indicates a different meaning:

(a) "Person" shall mean and include any individual, firm, association, company, partnership, corporation, joint stock company club, agency, syndicate, the state and any municipal corporation or other political subdivision of this state, trust, receiver, trustee, fiduciary and conservator.

(b) "Cigarettes" shall mean and include any roll for smoking, made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material excepting tobacco.

(c) "Sale" and "sell" shall mean and include any transfer for a consideration, exchange, barter, gift, offer for sale and distribution in any manner or by any means whatsoever.

(d) "Wholesaler" shall mean and include any person who acquires cigarettes for purposes of sale to retailers or to other persons for purposes of resale.

(e) "Retailer" means any person who is engaged in this state in the business of selling cigarettes at retail and any person selling cigarettes through vending machines.

(f) "Sell at wholesale," "sale at wholesale" and "wholesale sales" shall mean and include any sale made in the ordinary course of trade or usual conduct of the wholesaler's business, to a retailer for the purpose of resale.

(g) "Sell at retail," "sale at retail" and "retail sales" shall mean and include any sale for consumption or use made in the ordinary course of trade or usual conduct of the seller's business.

(h) "Basic cost of cigarettes" shall mean whichever of the two (2) following amounts is lower, namely (1) the invoice cost of cigarettes to the retailer or wholesaler, as the case may be; or (2) the lowest replacement cost of cigarettes to the retailer or wholesaler, as the case may be, within thirty (30) days prior to the date of sale, in the quantity last purchased (whether within or before the said thirty-day period), less, in either of said two (2) cases, all trade discounts except customary discounts for cash, plus the full face value of any stamps which may be required by any cigarette tax act of this state now in effect or hereafter enacted, if not already included by the manufacturer in his list price.

(i) (1) "Cost to wholesaler" shall mean the basic cost of the cigarettes involved to the wholesaler plus the cost of doing business by the wholesaler, and must include, without limitation, labor costs (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising. (2) In the absence of proof of a lesser or higher cost of doing business by the wholesaler making the sale, the cost of doing business by the wholesaler shall be presumed to be two per centum (2%) of the basic cost of the said cigarettes to the wholesaler, plus cartage to the retail outlet, if performed or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser or

higher cost, shall be presumed to be three-fourths of one per centum (¾ of 1%) of the basic cost of the said cigarettes to the wholesaler.

(j) (1) "Cost to the retailer" shall mean the basic cost of the cigarettes involved to the retailer plus the cost of doing business by the retailer, and must include, without limitation, labor (including salaries of executives and officers), rent, depreciation, selling costs, maintenance of equipment, delivery costs, all types of licenses, taxes, insurance and advertising. (2) In the absence of proof of a lesser or higher cost of doing business by the retailer making the sale, the cost of doing business by the said retailer shall be presumed to be eight per centum (8%) of the basic cost of cigarettes of the said retailer. (3) In the case of any retailer who in connection with the said retailer's purchase of any cigarettes shall receive not only the discounts ordinarily allowed upon purchases by a retailer, but also in whole or in part the discounts ordinarily allowed upon purchase by a wholesaler, the cost of doing business by the said retailer with respect to the said cigarettes shall be, in the absence of proof of a lesser or higher cost of doing business by the said retailer, the sum of the cost of doing business by the retailer, and, to the extent that he shall have received the full discounts ordinarily allowed to a wholesaler, the cost of doing business by a wholesaler as hereinabove defined in subdivision "i" (2).

49-3-3. SALES AT LESS THAN COST—PENALTY.—(a) It shall be unlawful for any retailer or wholesaler, with intent to injure competitors or destroy or substantially lessen competition, to advertise, offer to sell, or sell, at retail or wholesale, cigarettes at less than cost to such retailer or wholesaler, as the case may be, as defined in this act (49-3-1 to 49-3-13). Any retailer or wholesaler who violates the provision of this section shall be guilty of a misdemeanor and be punishable by fine of not more than five hundred dollars ($500.00).

(b) Evidence of advertisement, offering to sell, or sale of cigarettes by any retailer or wholesaler at less than cost to him as defined by this act shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

49-3-4. COMBINATION SALES—In all advertisements, offers for sale or sales involving two (2) or more items, at least one (1) of which items is cigarettes, at a combined price, and in all advertisements, offers for sale, or sales, involving the giving of any gift or concession of any kind whatsoever (whether it be coupons or otherwise), the retailer's or wholesaler's combined selling price shall not be below the cost to the retailer or the cost to the wholesaler, respectively, of the total of all articles, products, commodities, gifts and concessions included in such transactions, except that if any such articles, products, commodities, gifts or concessions, shall not be cigarettes, the basic cost thereof shall be determined in like manner as provided in subdivision "h" of section 2 (49-3-2).

49-3-5. SALES BY A WHOLESALER TO A WHOLESALER—When one (1) wholesaler sells cigarettes to any other wholesaler, the former shall not be required to include in his selling price to the latter, the cost to the wholesaler, as defined by section 2 (49-3-2) of this act, but the latter wholesaler, upon resale to a retailer, shall be subject to the provisions of the said section, Provided, however, that such latter wholesaler may, at his option, use as his basic cost of the cigarettes so sold, the basic cost of the wholesaler from whom he shall have purchased the same.

49-3-6. SALES EXCEPTIONS.—The provisions of this act (49-3-1 to 49-3-13) shall not apply to a sale at retail or a sale at wholesale made (a) in an isolated transaction and not in the usual course of business; (b) where cigarettes are advertised, offered for sale, or sold in a bona fide clearance sale

for the purpose of discontinuing trade in such cigarettes and said advertising, offer to sell, or sale shall state the reason thereof and the quantity of such cigarettes advertised, offered for sale, or to be sold; (c) where cigarettes are advertised, offered for sale or sold as imperfect or damaged, and said advertising, offer to sell, or sale, shall state the reason therefor and the quantity of such cigarettes advertised, offered for sale, or to be sold; (d) where cigarettes are sold upon the final liquidation of a business; or (e) where cigarettes are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court.

49-3-7. TRANSACTIONS PERMITTED TO MEET LAWFUL COMPETITION.—(a) Any retailer may advertise, offer to sell or sell cigarettes at a price made in good faith to meet the price of a competitor who is selling the same article at cost to the said competing retailer as defined in this act (49-3-1 to 49-3-13). Any wholesaler may advertise, offer to sell or sell cigarettes at a price made in good faith to meet the price of a competitor who is rendering the same type of service and is selling the same articles at cost to the said competing wholesaler as defined by this act. The price of cigarettes advertised, offered for sale or sold under the exceptions specified in section 6 (49-3-6), shall not be considered the price of a competitor and shall not be used as a basis for establishing prices below cost, nor shall the price established at a bankrupt sale be considered the price of a competitor within the purview of this section.

(b) In the absence of proof of the actual cost to the said competing retailer or to the said competing wholesaler, as the case may be, such cost may be presumed to be the lowest cost to retailers or the lowest cost to wholesalers, as the case may be, within the same trading area as determined by a cost survey made pursuant to section 9-b (49-3-9b).

49-3-8. SALES CONTRACTS VOID.—Any contract, expressed or implied, made by any person in violation of any of the provisions of this act (49-3-1 to 49-3-13), is illegal and void and no recovery shall be had thereon.

49-3-9. ADMISSIBLE EVIDENCE.—(a) In determining cost to the retailer and cost to the wholesaler, the court shall receive and consider as bearing on the bona fides of such cost, evidence tending to show that any person complained against under any of the provisions of this act (49-3-1 to 49-3-13) purchased the cigarettes involved in the complaint before the court, at a fictitious price, or upon terms, or in such a manner, or under such invoices, as to conceal the true cost, discounts or terms of purchase, and shall also receive and consider as bearing on the bona fides of such cost, evidence of the normal, customary and prevailing terms and discounts in connection with other sales or (of) a similar nature in the trade area or state.

(b) Cost survey. Where a cost survey pursuant to recognized statistical and cost accounting practices has been made for the trading area in which a violation of this act is committed or charged, to determine and establish on the basis of actual existing conditions the lowest cost to retailers or the lowest cost to wholesalers within the said area, the said cost survey shall be deemed competent evidence in any action or proceeding under this act as tending to prove actual cost to the wholesaler or actual cost to the retailer complained against, but any party against whom any such cost survey may be introduced in evidence, shall have the right to offer evidence tending to prove any inaccuracy of such cost survey or any state of facts which would impair its probative value.

49-3-10. SALES OUTSIDE ORDINARY CHANNELS OF BUSINESS—EFFECT.—In establishing the basic cost of cigarettes to a retailer or wholesaler, it shall not be permissible to use the invoice cost or the actual cost of any cigarettes pur-

chased at a forced, bankrupt, or close-out sale, or other sale outside of the ordinary channels of trade.

49-3-11. REMEDIES.—(a) The director of the luxury tax division of the state Bureau of Revenue or any person injured by any violation, or who would suffer injury from any threatened violation of this act (49-3-1 to 49-3-13), may maintain an action in any court of equitable jurisdiction to prevent, restrain or enjoin such violation or threatened violation. If in such action a violation or threatened violation of this act shall be established, the court shall enjoin and restrain, or otherwise prohibit, such violation or threatened violation, and, in addition thereto, the court shall assess in favor of the plaintiff and against the defendant, the costs of suit, including reasonable attorney's fees. In such action it shall not be necessary that actual damages to the plaintiff be alleged or proved, but where alleged and proved, the plaintiff in said action, in addition to such injunctive relief and costs of suit, including reasonable attorney's fees, shall be entitled to recover from the defendant the actual damages sustained by him.

(b) In the event that no injunctive relief is sought or required, any person injured by a violation of this act may maintain an action for damages and costs of suit in any court of general jurisdiction.

49-3-12. DIRECTOR OF THE LUXURY TAX DIVISION OF THE STATE BUREAU OF REVENUE—POWERS AND DUTIES.—The director of the luxury tax division of the state Bureau of Revenue may adopt rules and regulations for the enforcement of this act (49-3-1 to 49-3-13) and he is empowered to and may from time to time undertake and make or cause to be made one or more cost surveys for the state of such trading area or areas as he shall define, and when such cost survey

shall have been made by or approved by him it shall be permissible to use such cost survey as provided in sections 7-b and 9-b (49-3-7b and 49-3-9b), of this act.

Said director may, upon notice and after hearing, suspend or revoke any license issued under the provisions of the Cigarette Tax Act and the rules and regulations of the director promulgated thereunder, for failure of the licensee to comply with any provision of this Cigarette Fair Trade Practices Act or any rule or regulation adopted thereunder.

All of the powers vested in said director by the provisions of the Cigarette Tax Act shall be available to him in the enforcement of this Cigarette Fair Trade Practices Act.

The judgment or order of said director respecting any matter arising under the provisions of this act may be reviewed by the district court of Santa Fe County or certiorari.

49-3-13. PARTIAL UNCONSTITUTIONALITY. — The provisions of this act (49-3-1 to 49-3-13) shall be deemed to be severable, and if for any reason any provision shall be determined to be unconstitutional or invalid, such determination shall not be held to affect any other provision thereof. And no such determination shall be deemed to invalidate or render ineffectual any of the provisions of the Cigarette Tax Act.

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IN THE

Supreme Court of The United States

October Term, 1960

No. 352

PONCA WHOLESALE MERCANTILE COMPANY,
a corporation,

Appellant,

vs.

ROCKY MOUNTAIN WHOLESALE COMPANY, INC.,
a corporation,

Appellee.

On Appeal from the Supreme Court
of the State of New Mexico

MOTION TO DISMISS AND OR AFFIRM

BRIEF FOR APPELLEE IN SUPPORT OF MOTION TO DISMISS AND OR AFFIRM

LOUIS C. LUJAN,
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IN THE

Supreme Court of The United States

October Term, 1960

No.....

PONCA WHOLESALE MERCANTILE COMPANY,
a corporation,

Appellant,

vs.

ROCKY MOUNTAIN WHOLESALE COMPANY, INC.,
a corporation,

Appellee.

On Appeal from the Supreme Court
of the State of New Mexico

MOTION TO DISMISS AND OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves to dismiss and/or affirm on the grounds that no substantial federal question has been raised, or, in the alternative to dismiss on the grounds that the Jurisdictional Statement does not present a substantial federal question and that the federal questions contained therein as presented were not timely raised or expressly passed on by the Courts below; and to affirm on the grounds that the questions presented are so unsubstantial as to need no further argument.

STATEMENT

This is a direct appeal from the final judgment of the Supreme Court of the State of New Mexico which affirmed the judgment of the District Court of Bernalillo County, State of New Mexico. The New Mexico Cigarette Fair Trade Practices Act Laws of 1949, and ch. 175, Sections 1 to 13, incl., (49-3-1, 49-3-13, N. M. S. A., 1953).[1]

Appellant, in its Statement of the Case at pages 6 and 7 of Jurisdictional Statement has set down in its footnote number 2 a tabulation entitled "Net Cost In Purchases From Manufacturer" and another entitled "Cost To Wholesaler as defined by the act." At the end, there is a notation indicating a profit of 12 3/5 cents per carton. These tabulations do not appear in the transcript of the trial, excepting in appellant's brief in support of its motion for rehearing in the Supreme Court of the State of New Mexico (R. 313, 314). All such material was available and under the exclusive control of appellant.

Appellant deducted 2% cash discount from its net cost of purchases. A cash discount is not an element of the price, but is allowed for prompt payment only. Appellant in its "cost to wholesaler" used the formula of adding 2% as its cost of doing business and that formula is to be used only in the absence of proof of a lesser or higher cost of doing business by the wholesaler making the sale. Appellant had an opportunity at the time of the trial of this case on its merits (R. 74-76) to establish that it had a lesser cost of doing business than the 2% required to be added to the "basic cost to wholesaler" to cover such costs.

The very terms of the definition of "cost to wholesaler",

[1]Text of Act appears in appellant's Jurisdictional Statement as Appendix B p. 31.

set down in full in footnote number 1 of Jurisdictional Statement, page 5, gave appellant an opportunity to establish its lesser cost but it failed to do so. In fact, a subpoena duces tecum was served on appellant commanding it to produce all of its records covering its sales of cigarettes to Furr's Super Markets in Albuquerque, New Mexico, which included not only its sales records, but its cost accounting records and such other records as would indicate all overhead including salaries of executives and officers, tax, etc. as provided in that definition, which records were under the exclusive control of appellant. It refused to do so unless ordered by the Court (statement of counsel for appellant R-75). Instead, appellant stipulated that it was selling cigarettes to Furr's Super Markets in Albuquerque and to Safeway at six cents per carton under "cost to wholesaler."

Appellant, on page 10 of its Jurisdictional Statement under Federal Questions are Substantial, makes the statement that the definition of "wholesaler" in the New Mexico Cigarette Fair Trade Practices Act is not broad enough to include manufacturers of cigarettes selling to direct buying retailers and thus exempts such manufacturers from the provisions of the act.

The New Mexico Cigarette and Tobacco Tax Act defines the term "distributor" in Section 72-14-1(g) as follows:

> "The term 'distributor' means and includes any person, wherever resident or located, who brings or causes to be brought into this state, unstamped cigarettes purchased directly from manufacturers thereof and also any person who manufactures or produces or causes to be produced, cigarettes, and sells, uses or distributes the same within this state."

Manufacturers of cigarettes are clearly controlled by the

Act. It must be remembered, however, that none of the manufacturers of cigarettes are located within the boundaries of the State of New Mexico and they ship cigarettes in interstate commerce to distributors in the State of New Mexico. Distributors are wholesalers of cigarettes who purchase direct from the manufacturer and affix the cigarette tax stamp to the packages of cigarettes within the State of New Mexico. Both appellant and appellee belong in this class of wholesalers. There is another class of wholesalers operating in New Mexico, the definition of which is contained in section 72-14-1 (h) of the New Mexico Cigarette and Tobacco Tax Act and which reads as follows:

> "(h) The term 'wholesaler' means any person in this state, other than a distributor as defined herein, who acquires stamped cigarettes, at least seventy-five per centum (75%) of which are for the purpose of resale to retail dealers in this state or to other persons for the purpose of resale only."

ARGUMENT

The time has past when the power of a state government to enact laws for the public welfare of its citizens as a necessary element to the owning of private property can be questioned, and no longer is it an objection to its reasonable exercise and that the value of private property may be lowered or otherwise unfavorably affected.

The final judgment of the Supreme Court of the State of New Mexico is clearly correct. Section 49-3-3 of the New Mexico Cigarette Fair Trade Practices Act makes it unlawful for a wholesaler to advertise, offer to sell, or sell at wholesale, cigarettes at less than "cost to wholesaler" with intent to injure competitors or destroy or substantially lessen com-

petition. That section also imposes a penalty for the violation of the provisions of that section. (Jurisdictional Statement 33).

The right of a state to prohibit sales below cost is well settled and this question was passed on only two years ago by the United States Supreme Court in Safeway Stores, Inc., vs. Oklahoma Retail Grocers Association, Inc. and Louie J. Speed, Inc., 360 U. S. 334. This Court in its opinion made the following observation with reference to laws prohibiting sales below cost:

> "Trading stamps are given to cash customers 'across the board', namely, the number of stamps varies directly with the total cost of goods purchased. Safeway's price cutting, however, was selective. This difference is vital in the context of this act. One of the chief aims of the state laws prohibiting sales below cost was to put an end to 'loss-leader' selling. The selling of selected goods at a loss in order to lure customers into the store is termed not only a destructive means of competition, but it also plays on the gullability of customers by leading them to expect what generally was not true, namely that a store which offered such an amazing bargain was full of other such bargains. Clearly, there is reasonable basis for a conclusion that selective price cuts tend to perpetuate this abuse, whereas the use of trading stamps does not."

No facts are raised on this appeal which operate adequately to distinguish this case from the more comprehensive Safeway case previous before this Court.

It must be presumed that the legislature of the State of New Mexico made a thorough study of economic conditions

in New Mexico surrounding the sales of cigarettes in this State. Evidence of this fact is the Preamble to the New Mexico Cigarette Fair Trade Practices Act which appears in footnote number 5, page 12 of the Jurisdictional Statement. Having come to the conclusion that the act was necessary to promote the public welfare of the citizens of the State of New Mexico, by prohibiting the sales of cigarettes below cost in the retail and wholesale trade, it enacted the act which is the subject matter of the appeal in this case. The wisdom of the legislature of a state and the effectiveness of its action is not before this Court for review. Only the question of whether or not the action of the legislature is reasonable and nondiscriminatory. This Court in *Mayo, Commissioner of Agriculture of Florida, et al vs. Lakeland Highlands Canning Co.*, et al 309 U.S. 310 at 318 made the following statement:

> "The appellees' principal attack upon the statute, based upon the constitution, centers on its regulation of prices. The mere fact that the act fixes prices is, in itself, not sufficient to invalidate it, and allegation of that fact does not raise substantial federal questions. The presumption that an act fixing prices is constitutional would require the denial of a temporary injunction, except in extraordinary situations. Findings to support a conclusion against constitutionality would need to be unequivocal."

The cases cited by appellant in its footnote number 3 on page 9 of its Jurisdictional Statement and relied upon by appellant to support its claim that the right of an owner to establish the price at which his property is to be sold is protected by constitutional guarantee is refuted by the following cases: *Olsen vs. Nebraska* 313 U.S. 236 in which this Court, at pages 244 through 246 discussed these cases thoroughly and the change in the law on the question which is

the subject of appellant's statement referred to herein above; also in *Lincoln Federal Labor Union vs. Northwestern Iron and Metal Co.* 335 U.S. 525 at page 536, this Court expressly repudiated the decision in the case of *Charles Wolff Packing Co. vs. Court of Industrial Relations.*

The fact that the New Mexico Cigarette Fair Trade Practices Act classifies wholesalers and retailers including "direct buying retailers" separately, does not raise any substantial Federal question inasmuch as it has been long settled that the legislature of a state may validly make such different classifications. The Federal Court in the case of *Mennen Co. vs. Federal Trade Commission* (C.C.A. 2 1923), 228 Fed. 774, cert. denied 262 U. S. 759, although it did reverse the order of the Federal Trade Commission, said in discussing the particular question:

> "In conclusion it ought perhaps to be said that we have not been unmindful of the fact that the Mennen Company in classifying purchasers into two groups, those of wholesalers and retailers, placed in the groups of retailers a class of mutual or cooperative corporations which purchased in large quantities the Mennen products. These mutual or cooperative corporations, it is admitted, consist solely of the retailers in the same line of trade; the stock being held exclusively by retailers. The fact that these individuals, admitted by the counsel for the Federal Trade Commission to be retailers, see fit for their own convenience to organize themselves into a corporation which they constitute their agent for purchasing purposes, does not change their character, or the character of their purchases, and convert them into wholesalers.
>
> "Whether a buyer is a wholesaler or not does not de-

pend upon the quantity he buys. It is not the character of his buying, but the character of his selling, which marks him as a wholesaler, as this court pointed out in *Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, supra (277 Fed. 46). A wholesaler does not sell to the ultimate consumer. Mutual or co-operative concerns are buying for themselves to sell to ultimate consumers, and not to other 'jobbers' or to other 'retailers.' The nature of the transaction herein involved is not altered by the fact that they make their purchases through the agency of their corporation. For some purposes a corporation is distinct from the members who compose it. But that distinction is a fiction of the law, and the courts disregard the fiction whenever the fiction is urged to an intent and purpose which is not within its reason and policy. And in such a case as this the fiction cannot be invoked. The important fact is that the members of the corporation are all retailers who buy for themselves to sell to the ultimate consumer. The Mennen Company is within its rights in classifying them as retailers."

The following cases, among many others follow the same trend; *National Biscuit Co. vs. Federal Trade Commission* 299 Fed. 733; *Kresge vs. Champion Spark Plug*, 3 Fed. 2d 415; *Federal Trade Commission vs. Ruberoid Co.*, 343 U.S. 470.

A statute is unreasonable, arbitrary and discriminatory in its classification only if there is no justifiable basis for the legislature in creating the classifications established by law. See *Patsone vs. Pennsylvania* 232 U.S. 138. The above principal is clearly set out in the case of *Metropolitan Casualty Insurance Co. vs. Brownell, Receiver*, 294 U.S. 580 at 583 to 586. This Court laid down the rule which is in effect

as follows: The Equal Protection Clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on another provided there is a reasonable basis for the imposition of such statutory restriction.

A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.

It is not the function of an Appellate Court to weigh evidence or to question the wisdom or the appropriateness of the acts of a state legislature, but only if they are unreasonable and discriminatory.

The questions presented by appellant, pages 3 and 4 of its Jurisdictional Statement, were not timely raised or expressly passed on by the Courts below. An examination of the record will show that appellant did not request either a finding of fact or a conclusion of law that raised either of the questions covered under Questions Presented, in its Jurisdictional Statement (R. 30-34).

It is true that Mr. Cooper of Counsel for appellant in the District Court mentioned competition with the manufacturer. However, a review of the record, pages 107 to 109, will show that Mr. Cooper was only trying to explain his line of questioning. In appellant's motion for rehearing (R. 307) it did not base its motion for rehearing upon violation of the Fourteenth Amendment to the Constitution of the United States. Furthermore, appellant's motion for rehearing was made pursuant to rule 18 of the Supreme Court Rules of the State of New Mexico. This rule was interpreted in the case of *Pitek vs. McGuire*, 51 New Mexico 364; 184 P. 2d 647, where the Court in its opinion stated:

> "On rehearing, only those questions are reviewable which are provided for by the rule and matters which might have been considered on the original appeal but were not raised, will not be considered."

On the subject of whether or not the Supreme Court of the State of New Mexico expressly passed on the questions raised, the attention of the Court is called to the order of the Court denying appellant's motion for rehearing. It will be noted that the Court denied the motion without passing on the merits of the motion for rehearing or on the subjects covered by appellant's brief in support of its motion for rehearing, which would include at that time, the questions raised in appellant's Jurisdictional Statement under the heading Questions Presented, Jurisdictional Statement pp. 3 and 4. It is obvious from the fact that the Court did not pass on the merits that it considered that the questions raised by appellant's motion for rehearing and the points and questions argued in its brief in support of such motion were not timely raised.

CONCLUSION

It is respectfully submitted that this Court should dismiss the appeal and affirm the judgment of the Court below on the grounds urged in appellee's motion to dismiss and/or affirm.

Respectfully submitted,

Louis C. Lujan

LOUIS C. LUJAN
Attorney
for appellee.

Counsel of Record

Louis C. Lujan
1004 Simms Building
Albuquerque, New Mexico

PROOF OF SERVICE

I, Louis C. Lujan, attorney for Rocky Mountain Wholesale Company, Inc., a corporation, appellee herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the 18th day of September, 1961, I served a copy of the foregoing Motion to Dismiss and/or Affirm and Brief for appellee in support of Motion to Dismiss and/or Affirm, on Ponca Wholesale Mercantile Company, appellant herein, by delivering the same to James T. Paulantis, in person, in his office, 1220 Simms Building, Albuquerque, New Mexico, who is attorney and counsel of record for said Ponca Wholesale Mercantile Co.

Louis C. Lujan

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IN THE

Supreme Court of The United States

October Term, 1961

No. 352

PONCA WHOLESALE MERCANTILE COMPANY,
a corporation,

Appellant,

vs.

ROCKY MOUNTAIN WHOLESALE COMPANY, INC.,
a corporation,

Appellee.

On Appeal from the Supreme Court
of the State of New Mexico

BRIEF OPPOSING MOTION TO DISMISS AND OR AFFIRM

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STATUTES

New Mexico Laws of 1949, Chapter 175; 49-3-1 to 49-3-13, inclusive, N.M.S.A. 1953	2

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On Appeal from the Supreme Court
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BRIEF OPPOSING MOTION TO DISMISS AND OR AFFIRM

Appellant's brief opposing Appellee's "Motion To Dismiss And Or Affirm" will be confined to those matters raised in Appellee's motion and not heretofore answered in Appellant's Jurisdictional Statement, or to new matters advanced in Appellee's motion.

STATEMENT

Appellee's Statement, page 3, quotes from the New Mexico Cigarette and Tobacco Tax Act to refute Appellant's Statement, page 1, Jurisdictional Statement. The Cigarette and Tobacco Tax Act is not the act here under question. The act being considered on this appeal is the New Mexico Cigarette Fair Trade Practices Act, New Mexico Laws of 1949, Chapter 175; 49-3-1 to 49-3-13, inclusive, N.M.S.A. 1953.

ARGUMENT

The cases cited by Appellee in support of the proposition that a state may prohibit sales below cost[1] are not authorities opposing Appellant's position. The issue here before the Court is not whether a state may prohibit sales below cost, but whether in so doing it must enact laws which are not unreasonable, arbitrary, capricious or discriminatory.

[1] SAFEWAY STORES, INC. vs. OKLAHOMA RETAIL GROCERS ASSOCIATION, INC. and LOUIE J. SPEED, INC., 360 U.S. 334; 3 L.Ed. 2d 1280; 79 S.Ct. 1196; MAYO, COMMISSIONER OF AGRICULTURE OF FLORIDA, et al. vs. LAKELAND HIGHLANDS CANNING CO., et al., 309 U.S. 310, 318; 84 L.Ed. 774; 60 S.Ct. 517.

Again, at pages 6 and 7, Appellee's motion, the cases cited therein[2] to refute the point for which Appellant cited cases in footnote 3, page 9, Jurisdictional Statement, are not opposed or contrary to Appellant's position. The point is that the right to establish a price at which property may be sold is a property right protected by said constitutional amendment, not that such property right shall under all circumstances be free from regulation or control, but that regulation shall not be unreasonable, arbitrary or capricious.

NEBBIA v. PEOPLE OF THE STATE OF NEW YORK (1934), 291 U.S. 502, 525; 54 S.Ct. 505, 510; 78 L.Ed. 940.

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

[2] OLSEN v. NEBRASKA, 313 U.S. 236; 85 L.Ed. 1305; 61 S.Ct. 862; LINCOLN FEDERAL LABOR UNION vs. NORTHWESTERN IRON AND METAL CO., 335 U.S. 525; 93 L.Ed. 212; 69 S.Ct. 251.

As to other matters raised in Appellee's motion, such are considered covered or answered in Appellant's Jurisdictional Statement. It is respectfully submitted that the Jurisdictional Statement clearly shows the substantial nature of the questions presented, and because of the unreasonable, arbitrary and discriminatory nature of the New Mexico Cigarette Fair Trade Practices Act, the same should not be permitted to stand as opposed to the protection assured under the Fourteenth Amendment to the Constitution of the United States.

It is not the position of the Appellant that where the legislation is reasonable and not arbitrary, the state may under no circumstances regulate business or property rights of an individual or firm. It is further recognized that the constitutional guaranty does not require that the business itself be a public business, but may regulate any business or property right where the public interest or welfare requires. It is respectfully submitted, however, that such regulations must be reasonable and not arbitrary or discriminatory, as the New Mexico Cigarette Fair Trade Practices Act clearly is in respect to the particular point raised by this appeal.

Respectfully submitted,

BRYAN G. JOHNSON

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PROOF OF SERVICE

I, JAMES T. PAULANTIS, one of the attorneys for Ponca Wholesale Mercantile Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of October, 1961, I served a copy of the foregoing Brief Opposing Motion To Dismiss And Or Affirm on Rocky Mountain Wholesale Company, Inc., a corporation, appellee herein, by delivering the same to Louis C. Lujan, in person, in his office, 1004 Simms Building, Albuquerque, New Mexico, who is attorney and counsel of record for said Rocky Mountain Wholesale Company, Inc.